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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-351

No. COA21-525

Filed 17 May 2022

Pitt County, No. 17 CRS 1930

IN THE MATTER OF: PHILLIP ENTZMINGER, Assistant District Attorney Prosecutorial District 3A

Appeal by respondent from order entered 4 June 2021 by Judge Marvin K. Blount in Pitt County Superior Court. Heard in the Court of Appeals 23 March 2022.

*The North Carolina State Bar, by Deputy Counsel David R. Johnson, for Petitioner-Appellee.*

*Freedman Thompson Witt Ceberio & Byrd PLLC, by Christopher M. Watford, for Respondent-Appellant.*

CARPENTER, Judge.

¶ 1 Phillip Entzminger ("Respondent") appeals from an order of discipline (the "Order"), which was entered following a hearing on remand to determine disciplinary sanctions pursuant to an opinion by the Court of Appeals. After careful review, we affirm the Order.

## I. Procedural Background

¶ 2 The facts underlying this matter are set forth in detail in *In re Entzminger*, 266 N.C. App. 480, 831 S.E.2d 642 (2019), *disc. rev. denied*, 375 N.C. 284, 846 S.E.2d 284 (2020) ("*Entzminger I*") and are not directly relevant to our analysis; thus, we do not extensively recite the factual background here.

¶ 3 On 28 September 2017, the Pitt County Superior Court, upon its own motion, ordered Respondent to appear before the court to show cause why he should not be held in contempt or disciplined under its inherent power. The order alleged Respondent, in performing his duties as Assistant District Attorney for Prosecutorial District 3A and an officer of the court: "(1) showed a 'disregard for the dignity of the Court'; (2) 'demonstrated undignified and discourteous conduct'; (3) '[m]isled the Court by making statements he knew or should have known to be false'; and, (4) '[a]cted to create a false record.'" *Id.* at 484, 831 S.E.2d at 645. The Office of Counsel of the State Bar (the "State Bar") was appointed to prosecute the matter.

¶ 4 On 22 March 2018, a hearing was held before the Honorable Marvin K. Blount in Pitt County Superior Court. The hearing was divided into two phases: "the first phase was to determine whether Respondent had violated the Rules of Professional Conduct or was guilty of criminal contempt, and, if so, the second phase was to determine the appropriate discipline." *Id.* at 484, 831 S.E.2d at 645.

¶ 5 On 30 April 2018, the trial court entered an order of discipline, finding Respondent was not guilty of criminal contempt, but finding he violated Rules

3.3(a)(1), 4.4(a), 8.2(a), 8.4(c), and 8.4(d) of the North Carolina Rules of Professional Conduct. The trial court suspended Respondent from the practice of law for two years and allowed him to seek a stay of the remaining portion of his suspension after six months, upon meeting certain conditions.

¶ 6 On 22 May 2019, this Court heard the merits of Defendant's direct appeal. *Id.* at 485, 831 S.E.2d at 645. By a published opinion filed 6 August 2019, this Court concluded, *inter alia*, "[n]o evidence supports a finding or conclusion that Respondent engaged in misrepresentations concerning the docket and the reasons for the order in which the Aguilar case was called for trial . . . ." *Id.* at 490, 831 S.E.2d at 649. All other findings and conclusions of the trial court were affirmed by this Court. *Id.* at 493, 831 S.E.2d at 650. Accordingly, we affirmed in part, reversed in part, and remanded the matter "for a new hearing on the disciplinary sanctions to be imposed." *Id*. at 493, 831 S.E.2d at 650.

¶ 7 On 14 May 2021, the trial court conducted the hearing on remand before Judge Blount to determine the disciplinary sanctions to be imposed on Respondent. The State Bar argued the trial court should impose the same sanctions that were issued in the 30 April 2018 order of discipline because the remaining findings of fact and conclusions of law still support such sanctions. Counsel for Respondent contended an admonishment was sufficient punishment, and suspension of Respondent's law license was unnecessary. Respondent's counsel also asked the trial court if it would

allow Respondent to proffer witnesses before the trial court ruled on the matter; the trial court denied the request.

¶ 8 After considering Respondent's and the State Bar's disciplinary memoranda, the oral arguments of the parties, and the previous proceedings, the trial court announced it would "enter an order of the same discipline that was entered previously," and ordered "that if [Respondent] fulfills the requirements prior to the active—the expiration of six months, that the suspended sentence will commence." On 4 June 2021, the trial court entered its written Order. Respondent gave timely written notice of appeal.

## II. Jurisdiction

¶ 9 This Court has jurisdiction to address Respondent's appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

## III. Issues

¶ 10 The issues before this Court are whether the trial court: (1) abused its discretion in denying Respondent the opportunity to present evidence at the new hearing to determine disciplinary sanctions; (2) abused its discretion upon the judge's failure to recuse himself *ex mero motu* from the sanctions hearing; (3) abused its discretion by imposing on Respondent a two-year suspension from the practice of law; and (4) erred by failing to specify in its Order the duration of the active period of suspension Respondent is to serve prior to any petition for stay of suspension.

## IV. Presentation of New Evidence

¶ 11 In his first argument, Respondent contends this matter originated as, and has remained, a criminal contempt matter, and therefore, a *de novo* review of the evidence at the "resentencing" hearing was necessary. In support of his assertion the case is criminal, Respondent points to the trial court's file number, 17 CRS 1930, which he contends "clearly denot[es] the matter remained a criminal matter . . . ." He also asserts the intended effect of the trial court's disposition "was to forcibly prohibit [Respondent's] liberty interest in using his law license to provide an income for him and his family." The State Bar counters by arguing "[a]ttorney discipline by a court in the exercise of its inherent power is a civil matter, not a criminal matter." Therefore, the proper standard of review is whether the trial court abused its discretion in refusing to take additional evidence. After careful review of the pertinent statutes and caselaw, we agree with the State Bar.

> In North Carolina[,] there are two methods for enforcing attorney discipline. *In re Delk*, 336 N.C. 543, 550, 444 S.E.2d 198, 201 (1994). Under the first method, discipline may be imposed when the Council of the State Bar proceeds against an attorney pursuant to statute. *Id.* [at 550, 444 S.E.2d at 201]; *see* [N.C. Gen. Stat.] § 84-28 (2009). Under the second, a court possesses inherent authority to discipline attorneys. *In re Delk*, 336 N.C. at 550, 444 S.E.2d at 201.

*Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 182, 695 S.E.2d 429, 436, *reh'g denied*, 364 N.C. 442, 702 S.E.2d 65 (2010).

¶ 12 Our Court has made it clear that proceedings concerning the trial court's "inherent power to discipline attorneys" are civil matters rather than criminal matters. *In re Key*, 182 N.C. App. 714, 719, 643 S.E.2d 452, 456 (2007) (recognizing the attorney discipline matter was a civil proceeding); *see In re Robinson*, 37 N.C. App. 671, 678, 247 S.E.2d 241, 245 (1978) ("[D]isciplinary proceedings against an attorney are civil in nature . . . ."); s*ee also* N.C. Gen. Stat. § 84-36 (2021) ("Nothing contained in this Article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys.").

¶ 13 Where a civil matter is remanded to the trial court for the entry of additional findings of fact or conclusions of law, it is within the trial court's discretion whether new evidence shall be admitted. *See Hendricks v. Sank*s, 143 N.C. App. 544, 549, 545 S.E.2d 779, 782 (2001). "Remand is not intended to be an opportunity for either respondent or petitioner to retry its case." *In re J.M.D.*, 210 N.C. App. 420, 429, 708 S.E.2d 167, 173 (2011). "On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court." *Bodie v. Bodie*, 239 N.C. App. 281, 284, 768 S.E.2d 879, 881 (2015) (quoting *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962)).

> A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. A ruling committed to a trial court's discretion

> is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

*White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted).

¶ 14 In this case, the trial court ordered Respondent to appear before it to show cause why he should not be held in contempt or disciplined under its inherent power. The motion included the factual allegations that provided the basis for disciplinary action and expressly stated Respondent "is subject to the inherent disciplinary powers of the Court" based on those actions. The trial court's exercise of its inherent power is also evidenced by the Order, which concluded Respondent's conduct "constitutes grounds for discipline pursuant to [N.C. Gen. Stat. § 84-28(b)(2), N.C. Gen. Stat. § 5A-15(g), N.C. Gen. Stat. § 84-36], and *the Court's inherent authority* . . . ." (Emphasis added). Thus, the matter is a civil proceeding even though it was initiated by the trial court's motion, which alleged, *inter alia*, Respondent's actions constituted criminal contempt. *See In re Key*, 182 N.C. App. at 719, 643 S.E.2d at 456; *In re Robinson*, 37 N.C. App. at 678, 247 S.E.2d at 245.

¶ 15 Respondent relies in part on *State v. Watkins*, 246 N.C. App. 725, 783 S.E.2d 279 (2016), *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557 (1986), *State v. Hardy*, 250 N.C. App. 225, 792 S.E.2d 564 (2016), and *State v. Abbott*, 90 N.C. App. 749, 370 S.E.2d 68 (1988), to support his assertion that he had a right to present additional evidence at the hearing relating to the factors enumerated in 27 N.C. Admin. Code

1B.0116(f)(1). He further argues the trial court was required to "make a new and fresh determination as to punishment." As discussed above, these criminal cases are inapplicable to the determination of whether additional evidence may be proffered in a civil matter. *See In re Key*, 182 N.C. App. at 719, 643 S.E.2d at 456; *In re Robinson*, 37 N.C. App. at 678, 247 S.E.2d at 245. Thus, this argument is without merit.

¶ 16 The transcripts of the 14 May 2021 hearing on remand reveal Respondent's counsel reminded Judge Blount of a pre-trial telephone conference. On the call, Judge Blount indicated Respondent's witnesses would not be allowed, but he would reconsider the issue. After being reminded of the conversation at the hearing, Judge Blount responded to counsel for Respondent regarding the call:

> I'm not going to change my position at this point based on what was said on the call. I said I will give you an opportunity to present on behalf of your client and then I will determine whether or not—in my discretion whether or not any witness or other evidence would be appropriate.

¶ 17 In *Entzminger I*, this Court affirmed all findings of fact of the original discipline order—including findings as to factors in 27 N.C. Admin. Code 1B.0116(f), which the trial court considers in imposing suspension or disbarment—except one finding regarding a statement Respondent made concerning the docket. *In re Entzminger*, 266 N.C. App. at 493, 831 S.E.2d at 650. The remaining findings of fact were conclusive on appeal in *Entzminger I* where this Court held the findings were supported by "[c]ompetent evidence." *Id.* at 492–93, 831 S.E.2d at 650 ("Our review

of the trial court's findings of fact [in a disciplinary order] 'is limited to whether there is competent evidence in the record to support the findings.'"). The matter was remanded for "a new hearing on the disciplinary sanctions to be imposed." *Id*. at 493, 831 S.E.2d at 650.

¶ 18 Judge Blount's decision to not allow the presentation of additional evidence was a "reasoned decision," considering only the issue of sanctions was before the court and all other issues were previously decided. *See White*, 312 N.C. at 777, 324 S.E.2d at 833. This Court's remand of the matter for a new hearing on sanctions was not intended to give Respondent a chance to retry his case. *See In re J.M.D.*, 210 N.C. App. at 429, 708 S.E.2d at 173. Rather, the hearing was for the sole purpose to allow the trial court to determine disciplinary sanctions that are supported by the Order's conclusions of law. *See Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980) (explaining that in a bench trial, the "[e]vidence must support findings[,] findings must support conclusions[, and] conclusions must support the judgment"); *Bodie*, 239 N.C. App. at 284, 768 S.E.2d at 881. Judge Blount found that no additional witnesses or evidence were necessary to determine disciplinary sanctions and ordered sanctions that were substantially similar to those he originally mandated. Therefore, the trial court did not abuse its discretion in denying Respondent's request to present additional evidence. *See White*, 312 N.C. at 777, 324 S.E.2d at 833.

## V. Judicial Recusal

¶ 19 In his second argument, Respondent argues the trial court judge, Judge Blount, abused his discretion by failing to recuse himself *ex mero motu*. Respondent refers to Canon 4D of the North Carolina Code of Judicial Conduct in presenting the issue in the index and header of his brief. Nonetheless, Respondent provides no support or discussion relating to the judge's failure to recuse himself as a violation of Canon 4D; thus, we consider this argument abandoned. *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

¶ 20 Next, Respondent argues Judge Blount should have made "a formal record of disclosure contemplated by Canon 3D . . . ." Canon 3D provides: "[n]othing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon . . . the judge's own initiative." N.C. Code Jud. Cond. Canon 3D. Alternatively, a judge may "disclose on the record the basis of the judge's potential disqualification." *Id.*

¶ 21 Respondent concedes Canon 3D does not require a judge rescue himself, although he argues Judge Blount may have "gained personal knowledge of disputed evidentiary facts regarding [Respondent's] attempts to publicly apologize to Judge Foster." Respondent's arguments are unpersuasive because our Court has interpreted the Code of Judicial Conduct as not imposing "an affirmative duty upon a trial judge to disqualify himself or herself, upon their own motion." *In re Key*, 182

N.C. App. at 719, 643 S.E.2d at 456.

¶ 22 Respondent also relies on Canon 3C. Canon 3C of the North Carolina Code Judicial Conduct provides in pertinent part:

> (1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:
>
> a. The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings[.]

N.C. Code Jud. Cond. Canon 3C(1).

¶ 23 In this case, Respondent admits in his brief he "never moved to recuse Judge Blount from the resentencing hearing or requested that Judge Blount explain the level of contact he had with Judge Foster, who was a material witness." By not moving to recuse Judge Blount, Respondent failed to preserve the issue for appeal. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."); *see In re Key*, 182 N.C. App. at 719, 643 S.E.2d at 456. In any event, Canon 3C encourages a judge to recuse him or herself, but it does not require him or her to do so. *In re Key*, 182 N.C. App. at 719, 643 S.E.2d at 456. Therefore, we hold Respondent has not shown Judge Blount

abused his discretion by failing to recuse himself from Respondent's proceedings. *See White*, 312 N.C. at 777, 324 S.E.2d at 833.

## VI. Suspension as a Disciplinary Sanction

¶ 24 In his third argument, Respondent maintains this "Court reviews orders involving suspension to determine if the trial court had a rational basis to impose suspension over lesser sanctions." The State Bar argues Respondent "misstates the [applicable] standard of review . . . ." We agree with the State Bar.

¶ 25 We review the trial court's imposition of sanctions under its inherent power to discipline attorneys for abuse of discretion. *Couch v. Private Diagnostic Clinic*, 146 N.C. 658, 663, 554 S.E.2d 356, 361 (2001), *disc. rev. denied*, 355 N.C. 348, 563 S.E.2d 562 (2002).

¶ 26 The sanctions available for a trial court to impose when disciplining an attorney "include citations for contempt, censure, informing the North Carolina State Bar of the misconduct, imposition of costs, suspension for a limited time of the right to practice before the court, suspension for a limited time of the right to practice law in the State, and disbarment." *In re Robinson*, 37 N.C. App. at 676, 247 S.E.2d at 244.

¶ 27 "Suspension or disbarment is appropriate where there is evidence that the defendant's actions resulted in significant harm or potential significant harm to the clients, the public, the administration of justice, or the legal profession, and lesser

discipline is insufficient to adequately protect the public." 27 N.C. Admin. Code 1B.0116(f) (2021). The rule also provides ten factors to consider when determining whether suspension or disbarment is appropriate. 27 N.C. Admin. Code 1B.0116(f)(1).

¶ 28 Here, the trial court made findings of fact and conclusions of law incorporating the relevant factors under 27 N.C. Admin. Code 1B.0116(f)(1). It found Respondent's: (1) intent to commit acts where the harm or potential harm is foreseeable; (2) lack of honesty, trustworthiness, or integrity were reflected from the circumstances; and (3) actions had a negative impact on the administration of justice.

¶ 29 Respondent nevertheless argues findings of fact 9–12, 43, 48, 52(a), disciplinary finding of fact 4, and conclusion of law 2(a) are not supported by the record evidence. Because these findings of fact and conclusions of law were previously affirmed by this Court, and the only issue on remand was the imposition of sanctions based on this Court's reversal of one conclusion of law, we decline to consider Respondent's challenges. *See Bodie*, 239 N.C. App. at 284, 768 S.E.2d at 881.

¶ 30 Next, Respondent argues "there must be a rational nexus between a significant harm or potential harm and [his] alleged conduct . . . to justify suspension." He further argues "[a] lesser form of discipline is adequate and just." As support for his assertions, Respondent points to two attorney disciplinary actions—both involving a prosecutor—to argue the punishment he received "exceeded the discipline similarly

situated prosecutors received." In light of the standard of review we exercise over a trial court's imposition of discipline through its exercise of inherent authority, we disagree.

¶ 31 In the case of *In re Key*, the respondent made a similar argument; he argued that the trial court erred in imposing the sanction of suspension of his ability to practice law because it failed to make findings of fact explaining: "'(1) the harm or potential harm created by the attorney's misconduct, *and* (2) a demonstrable need to protect the public[,]' as required under *Talford* . . . ." *In re Key*, 182 N.C. App. at 720, 643 S.E.2d at 457 (emphasis in original); *see N.C. State Bar v. Talford*, 356 N.C. 626, 637–38, 576 S.E.2d 305, 313 (2003). Without such findings, the respondent contended the suspension was "unreasonable and inappropriate." *Id.* at 720, 643 S.E.2d at 457. The *Key* Court explained that the *Talford* proceeding was distinguishable because it "was a proceeding before the North Carolina State Bar, not a proceeding where a trial court was exercising its inherent authority to discipline an attorney." *Id.* at 720, 643 S.E.2d at 457. In affirming the sanction, this Court reasoned an attorney's suspension of the right to practice law is statutorily allowed under N.C. Gen. Stat. § 84-36, and the imposition of the sanction rested within the sound discretion of the trial court. *Id.* at 721–22, 643 S.E.2d at 457.

¶ 32 In this case, the trial court considered the findings of fact and conclusions of law tending to show: (1) Respondent showed "disregard for the dignity of the Court"

by filing a document that "demonstrates undignified and discourteous conduct that is degrading to the Court and that breeds disrespect for the Court and the legal profession"; and (2) Respondent made a material misrepresentation by claiming he had learned of a witnesses' unavailability only minutes before a hearing, in which he moved for a continuance.

¶ 33 The trial court was not required to follow the sanctions imposed in other cases and acted within its discretion by suspending Respondent from the practice of law, considering the findings and conclusions of law of the Order. *See* 27 N.C. Admin. Code 1B.0116(f); *see also In re Key*, 182 N.C. App. at 721, 643 S.E.2d at 457 (explaining that although a one-year suspension from the practice of law in Wake County was "severe," it was not an abuse of discretion). Therefore, we conclude the trial court did not abuse its discretion by imposing on Respondent a two-year suspension from the practice of law. *See White*, 312 N.C. at 777, 324 S.E.2d at 833.

## VII. Active Period of Suspension

¶ 34 In his fourth and final argument, Respondent asserts the trial court erred in failing to specify the active period in which he is required to wait before seeking a stay of the remaining period of suspension. The State Bar contends the Order is unambiguous and was drafted, consistent with the trial court's remarks from the bench, to allow Respondent to immediately seek a stay upon a showing of compliance with the conditions. Our review of the record reveals the Order—unlike the initial

order of discipline, which required a six-month waiting period—allows Respondent to immediately seek a stay of suspension upon complying with the conditions set forth in paragraph 5 of the Order's "order of discipline."

¶ 35 In the original order of discipline, the trial court allowed Respondent to seek a stay of the remaining period of suspension "[n]o earlier than six months after the effective date" of the order, upon meeting specified conditions. In the revised Order, the trial court allowed Respondent to seek a stay subject to meeting certain conditions "[a]fter the active period of the suspension has gone into effect."

¶ 36 At the hearing on remand, the trial court explained: "if . . . the Respondent complies with all the terms, that the matter would be suspended—or the suspended term would commence *before* the expiration of six months if he complies with those before the six month date." (Emphasis added). Put another way, if Respondent fulfills the conditions before the expiration of six months, "the suspended sentence will commence."

¶ 37 The active period is not defined in the Order; however, the trial court mandated in paragraph 1 of the "order of discipline" section of the Order that Respondent be suspended "effective 30 days from service of th[e O]rder upon [Respondent]." The State Bar contends Respondent "may seek a stay of the balance of the suspension *at any time*" despite the State Bar advocating in its 5 May 2021 "Disciplinary Memorandum" for "the possibility of stay after at least six months" of suspension.

Based on the plain language of the Order and the trial court's explanation at the hearing, we conclude the "active period" of suspension begins on the effective date of the suspension; thus, Respondent is eligible to immediately seek a stay of the balance of the suspension contingent upon meeting certain conditions. *See* 27 N.C. Admin. Code 1B.0129(b).

## VIII. Conclusion

¶ 38 This appeal concerns a civil proceeding because it involves attorney discipline by a court in the exercise of its inherent power. The trial court did not abuse its discretion by: (1) not allowing Respondent to present additional witnesses at the sanctions hearing; or (2) suspending Respondent's right to practice law for two years and allowing Respondent to seek a stay upon meeting certain conditions.

¶ 39 The trial court did not err by omitting from the Order the definition of "active period of the suspension." We conclude, based on the plain language of the Order, Respondent may immediately seek a stay of his remaining period of suspension after meeting the requirements set out in "order of discipline" paragraph 5.

¶ 40 Furthermore, Judge Blount did not abuse his discretion by not recusing himself where Respondent had failed to make a motion for his recusal. We decline to consider Respondent's challenges to the Order's findings and conclusions of law because the matter was remanded to the trial court for the limited purpose of determining disciplinary sanctions, and we are bound by the Order's findings of fact

and conclusions of law, which were previously adjudicated by this Court.

AFFIRMED.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).